UNITED STATES SENATE
REPUBLICAN
POLICY COMMITTEE

Larry E. Craig, Chairman
Jade West, Staff Director

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The Ol' Bait-and-Switch

S. 1052 Pulls a Fast One on Employer Liability, Contract Sanctity, and Medical Review

The McCain-Edwards-Kennedy bill (S. 1052) as described by its sponsors is a far cry from the bill as written. Its sponsors (and even its textual headings) promise it would (1) shield employers from lawsuits, (2) uphold the sanctity of employee-health plan contracts, and (3) require coverage disputes to go through the appeals process before going to court. Look below the headings, however, and you will see that the bill pulls a bait-and-switch on each provision. In fact, S. 1052 would authorize lawsuits against employers, require employers to cover treatment specifically excluded from their health plan contract (and allow them to be sued if they don't), and allow trial lawyers to drag employers into court without first obtaining a medical review.

EMPLOYER LIABILITY PART I

"We actually specifically protect employers. Employers cannot be sued under our bill."
Senator John Edwards, describing S. 1052, *Today Show*, June 19, 2001

BAIT	***SWITCH***
"(5) EXCLUSION OF EMPLOYERS AND OTHER PLAN SPONSORS.— "(A) CAUSES OF ACTION AGAINST EMPLOYERS AND PLAN SPONSORS PRECLUDED.—Subject to subparagraph (B), paragraph (1)(A) does not authorize a cause of action against an employer or other plan sponsor maintaining the plan (or against an employee of such an employer or sponsor acting within the scope of employment).	"(B) CERTAIN CAUSES OF ACTION PERMITTED.—Notwithstanding subparagraph (A), a cause of action may arise against an employer or other plan sponsor (or against an employee of such an employer or sponsor acting within the scope of employment)—
S. 1052.PCS, page 144, lines 16-25 (emphasis added)	S. 1052.PCS, page 145, lines 1-6 (emphasis added)

EMPLOYER LIABILITY PART II

"First of all, we specifically protect employers from lawsuits."
Senator John Edwards, describing S. 1052, *This Week with Sam & Cokie*, June 17, 2001

BAIT	***SWITCH***
"(3) EXCLUSION OF EMPLOYERS AND OTHER PLAN SPONSORS.— "(A) CAUSES OF ACTION AGAINST EMPLOYERS AND PLAN SPONSORS PRECLUDED.— Subject to subparagraph (B), paragraph (1) does not apply with respect to — "(i) any cause of action against an employer or other plan sponsor maintaining the plan (or against an employee of such an employer or sponsor acting within the scope of employment), or "(ii) a right of recovery, indemnity, or contribution by a person against an employer or other plan sponsor (or such an employee) for damages assessed against the person pursuant to a cause of action to which paragraph (1) applies. S. 1052.PCS, page 160, line 21 through page 161, line 13 (emphasis added)	"(B) CERTAIN CAUSES OF ACTION PERMITTED.— Notwithstanding subparagraph (A), paragraph (1) applies with respect to any cause of action described in paragraph (1) maintained by a participant or beneficiary against an employer or other plan sponsor (or against an employee of such an employer or sponsor acting within the scope of employment)— S. 1052.PCS, page 161, lines 14-21 (emphasis added)

SANCTITY OF HEALTH PLAN CONTRACTS

BAIT	*SWITCH*
(C) NO COVERAGE FOR EXCLUDED BENEFITS.— Nothing in this subsection shall be construed to permit an independent medical reviewer to require that a group health plan, or health insurance issuer offering health insurance coverage, provide coverage for items or services for which benefits are specifically excluded or expressly limited under the plan or coverage in the plain language of the plan document (and which are disclosed under section 121(b)(1)(C)) . . . S.1052.PCS page 35, line 20 through page 36, line 5 (emphasis added)	. . . except to the extent that the application or interpretation of the exclusion or limitation involves a determination described in paragraph (2). S.1052.PCS page 36, lines 5 through 8 (emphasis added)

UPSHOT

"I have a standard option Blue Cross/Blue Shield policy . . . That is what I paid for, and Blue Cross/Blue Shield gave me a contract. Now, that contract is binding today. . .

"If you are going to come back and say that Blue Cross/Blue Shield has to provide me services even if they are excluded in the contract and if a medical reviewer decides that I need them, what is that going to do to the cost of the standard option Blue Cross/Blue Shield policy?

"The cost of health insurance is going to explode in America because contracts do not mean anything, and when contracts do not mean anything we all have to pay higher prices, and some people lose their health insurance."

Senator Phil Gramm, *Congressional Record*, June 21, 2001, S6568.

MEDICAL REVIEW BEFORE LAWSUITS

"If the HMO denies the claim, we have an internal review process within the HMO. We have an independent external review process. And it's only when those processes don't work that anybody goes to court."
Senator John Edwards, describing S. 1052, *This Week with Sam & Cokie*, June 17, 2001

BAIT

"(9) **REQUIREMENT OF EXHAUSTION**.—

> "(A) IN GENERAL.— Except as provided in this paragraph, **a cause of action may not be brought** under paragraph (1) in connection with any denial of a claim for benefits of any individual **until all administrative processes under sections 102 and 103 of the Bipartisan Patient Protection Act of 2001 (if applicable) have been exhausted**.

S.1052.PCS page 150, lines 17 through 25 (emphasis added)

SWITCH

Note that subparagraph (A) states, "**Except as provided in this paragraph** . . ."

What the next two pages of paragraph (9) provide is that an individual could take an employer to court and seek monetary damages (as opposed to the benefit demanded) without completing an external or even an internal appeal simply by (1) waiting 181 days from a coverage denial to claim injury, or (2) claiming the benefit denial would cause "immediate and irreparable harm."

UPSHOT

"If we are really concerned about health care being provided for the patient, we should require that the internal and external appeal happen, happen quickly, and those appeals be exhausted before there is ever a right to sue. . .

"By allowing a patient to simply wait until 180 days have expired and then to simply allege they only now discovered the injury and to go directly to court without ever having gone through an internal appeal, without ever having gone through an external appeal, is to open the floodgates to lawsuits."

Senator Tim Hutchinson, *Congressional Record*, June 20, 2001, S6476.

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